

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE CITY
OF STERLING HEIGHTS,

Plaintiff/Appellee,

vs.

Case No. 2006-0769-AR

LEON BERISHAJ,

Defendant/Appellant.

OPINION AND ORDER

Defendant-Appellant Leon Berishaj filed an application for leave to appeal from a decision of the 41-A District Court, the Hon. Stephen S. Sierawski presiding. On January 17, 2006, following an evidentiary hearing, the lower court denied defendant's motions to dismiss for lack of uniformity and violations of due process. A stipulated order certifying the issue to this Court and staying the proceedings was entered on January 30, 2006. On May 15, 2006, this Court heard oral argument regarding this appeal.

MCR 7.101(B)(2) provides that when an appeal of right is not available, or the time for taking an appeal of right has passed, the time for filing an application for leave to appeal is governed by MCR 7.103. An application for leave to appeal must be filed within 21 days after entry of the judgment or order appealed from. MCR 7.103(B)(1). An application must state the grounds for the appeal and describe the proceedings in the lower court. MCR 7.103(B)(2). It is at the Court's discretion whether to grant or deny leave to appeal after considering the merit of the grounds for the appeal. MCR 7.103(B)(5).



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On January 10, 2005 Sterling Heights Police Officer McCormick executed a traffic stop of defendant for speeding. While Officer McCormick interviewed defendant, the officer smelled alcohol on him. A Blood Alcohol Content ("BAC") test was administered in a room, which was equipped with a DataMaster audio/video recording system, at the Sterling Heights Police Department. Defendant's BAC was 0.13. Defendant was charged with operating while intoxicated in violation of the local ordinance 49-1 that adopts the Michigan Vehicle Code by reference.

On August 26, 2005 defendant filed a motion to dismiss for lack of uniformity and violations of due process. Following an evidentiary hearing on January 17, 2006, the lower court denied defendant's motions. Thereafter, on February 21, 2006, defendant filed his application for leave to appeal, seeking this Court's review.

This Court reviews the trial court's ruling regarding a motion to dismiss under the abuse of discretion standard. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). If the lower court's ruling is based on a question of law then the decision is reviewed de novo. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

Pursuant to the stipulated order certifying the issue dated January 30, 2006 there are two issues for this Court's review. The first issue is whether a city in its adoption by reference of the Michigan Vehicle Code can include the adoption of changes made to the code subsequent to the enactment of the adopting ordinance. The second question presented is whether a city's reuse of a videotape which resulted in the erasure of the prior recording, believed by the defense to have shown the defendant during part of the 15 minute observation period prior to the administration of a DataMaster breath test, violated defendant's due process rights.

Defendant asserts the City of Sterling Heights ordinance fails to conform to the Michigan statute as amended. Defendant contends the City of Sterling Heights failed to specifically adopt amendments and the general adoption of future amendments is unlawful. In addition, defendant argues his due process rights were violated by the destruction of the DataMaster audio/visual recording of the administration of the breath test. According to defendant, material exculpatory evidence was destroyed in bad faith.

The people respond that the City of Sterling Heights' adoption of future amendments of state statutes is proper. Regardless, the people contend the state statute is still valid and the amended statute is more stringent so no constitutional rights were violated. Additionally, the people argue defendant's assertions that the destroyed evidence was material and exculpatory are mere speculation. The people further assert no bad faith was demonstrated since the police department does not retain the original tapes and recycles the tapes after 90 days.

The Court will begin its review with the City of Sterling Heights adoption of the Michigan Motor Vehicle Code ("MVC"). The MVC must be uniform throughout the state and no local authority can adopt, enact, or enforce a law in conflict. MCL 257.605(1). Here, on October 17, 2000, the City of Sterling Heights, pursuant to local ordinance 49-1, adopted the MVC and Uniform Traffic Code ("UTC") by reference. The code specifically included future amendments by stating "as it may be amended from time to time." Portions of the MVC have since been amended; specifically MCL 257.625a was amended and became effective September 2003.

In *People v Urban*, 45 Mich App 255, 262; 206 NW2d 511 (1973), relied upon by defendant, the court stated that statutes that incorporate federal statutes by reference are valid, but "state legislation that adopts future legislation which are enacted, adopted, or promulgated by

another sovereign entity, constitutes an unlawful delegation of legislative power.” This rule is distinguishable from the present matter. Here, the City of Sterling Heights is not a sovereign entity, but rather a subordinate governmental instrumentality created by the state to assist the state in carrying out governmental functions. *See People v Wilson*, 454 Mich 421, 437; 563 NW2d 44 (1997); *Waller v Florida*, 397 US 387, 392; 90 S Ct 1184; 25 L Ed 2d 435 (1970).

The evidence establishes that all cities must be uniform with regards to the MVC, and the City of Sterling Heights have complied by adopting the MVC and its future amendments pursuant to local ordinance 49-1. Defendant has failed to furnish the Court with any statute or binding caselaw that prevents a city from adopting future amendments of statutes. It is not sufficient for a party simply to announce a position or assert an error and then leave it up to the court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). A party should not leave it to the appellate court to search for authority either to sustain or reject his position. *Id.* The Court finds defendant’s argument is without merit.

The Court now turns to defendant’s violation of due process claim. If the state fails to disclose to the defendant material exculpatory evidence, the good or bad faith of the state is irrelevant to a claim based on loss of evidence. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989) (internal citations omitted). Where it is unknown if the destroyed evidence would have been exculpatory, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police. *Id.* Defendant bears the burden to demonstrate the evidence was exculpatory or destroyed in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Here, defendant is unable to demonstrate the destroyed evidence was exculpatory, but only indicates the evidence was potentially useful to establish he had no physical signs of intoxication or that the officer failed to observe defendant for 15 minutes prior to testing. Further, defendant failed to demonstrate bad faith on the part of the police. Defendant contends that since the police department was aware of problems with the video equipment and failed to preserve the original by recycling it according to policy, the police department acted in bad faith. In *People v Johnson, supra*, the court specifically found "the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal." The record demonstrates the recordings were destroyed according to the department's policy to recycle the tapes after 90 days. This alone can not establish bad faith and defendant's argument must fail.

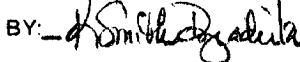
For the reasons set forth above, the Court DENIES defendant's application for leave to appeal on the grounds that defendant failed to present a meritorious issue to be determined on appeal.¹ Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last appellate issue and closes this case. This Court does not retain jurisdiction.

IT IS SO ORDERED.

EDWARD A. SERVITTO
CIRCUIT JUDGE

AUG 23 2006

EDWARD A. SERVITTO, JR., Circuit Court Judge

A TRUE COPY
CARMELLA S. BAUGH, COUNTY CLERK
BY:  Court Clerk

Date:

Cc: Donald DeNault, Jr., Attorney for Plaintiff/Appellee

John Talpos, Attorney for Defendant/Appellant

¹ The Court notes that on March 17, 2006 the people filed a motion to strike defendant's Exhibits 1, 2, 4, 5, 6, and 7. Based on the Court's conclusion, it is unnecessary to address the people's remaining motion.